STATE OF MICHIGAN
SUPREME COURT

ALLY FINANCIAL, INC., Plaintiff/Appellant, v. STATE TREASURER, STATE OF MICHIGAN and DEPARTMENT OF TREASURY, Defendants/Appellees.	Court of Appeals Docket No. 327815 Court of Claims Lower Court No. 13-000049-MT
SANTANDER CONSUMER USA, INC., Plaintiff/Appellant, v. STATE TREASURER, STATE OF MICHIGAN and DEPARTMENT OF TREASURY, Defendants/Appellees.	Court of Appeals Docket No. 327832 Court of Claims Lower Court No. 13-000114-MT
SANTANDER CONSUMER USA, INC., Plaintiff/Appellant, v. STATE TREASURER, STATE OF MICHIGAN and DEPARTMENT OF TREASURY, Defendants/Appellees.	Court of Appeals Docket No. 327833 Court of Claims Lower Court No. 13-000113-MT

APPELLANTS' APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF JURISDICTION

This Court has discretion to exercise jurisdiction and grant leave to appeal under MCR 7.303(B)(1).

STATEMENT OF QUESTIONS PRESENTED

I. MCL 205.54i provides for refund or deduction of sales tax paid on installment or credit sales that subsequently result in bad debts if: (1) a taxpayer/retailer that reported sales tax to the Michigan Department of Treasury and a lender that funded the sales tax paid to the Department maintain a written election designating which one may claim the refund or deduction, and (2) the account receivable was found worthless and written off after September 30, 2009. Among other items, MCL 205.54i defines bad debt as not including "repossessed property." When Appellants calculated the amount of the bad debt for each account in their tax refund claims, they deducted amounts received as a result of the repossession and subsequent sales of motor vehicles securing the accounts, and included in the claims only the amounts remaining due and owing after application of repossession proceeds. Appellee, the Michigan Department of Treasury (the "Department") denied the portions of the tax refund claims that represented any account in which the motor vehicle was repossessed, interpreting MCL 205.54i as a blanket prohibition of a refund of sales tax on any bad debt account in which property was repossessed, even if a deficiency remained after repossession. This interpretation is contrary to the plain language of the statute and the interpretation of similar language in statutes in other states. Did the Court of Appeals err in holding that MCL 205.54i prohibits tax refunds on bad debt accounts that include repossessed property?

Court of Appeals' answer: No

Appellants' answer: Yes

Appellee's answer: No

II. MCL 205.54i also provides that the tax refund claims must be supported by evidence required by the Department. Until recently and only after Appellants filed their refund claims and this litigation was commenced, the Department had not promulgated a rule or provided any guidelines on the documents necessary to support a refund claim under MCL 205.54i. While Appellants provided documents sufficient to establish their right to a tax refund, the Department denied a portion of the claims because Appellants did not provide RD-108 forms, titled "Application for Michigan Title & Registration Statement of Vehicle Sale" to prove that sales tax was paid on the motor vehicle sales. These forms are prepared and submitted by the dealers who sell the motor vehicles and are not routinely provided to Appellants by the dealers or kept in the course of Appellants' business. Appellants provided other documentation that conclusively proved that sales tax was paid on the motor vehicles that were the subject of Appellants' tax refund claims. When considering a motion for summary disposition, the court must consider all of the evidence in the light most favorable to the non-moving party – in this case, Appellants. If Appellants provided documentation sufficient to prove their refund claims, can the Department nevertheless require them to provide additional cumulative documents that are not required by the statute, promulgated rules, or Department guidance?

Court of Appeals' answer: Yes

Appellants' answer: No

Appellee's: Yes

III. MCL 205.54i requires that retailers and lenders execute election forms designating which one of them is entitled to claim the tax refund provided by the statute. The Department has not promulgated a standard election form for taxpayers to use or provided any guidance on the contents of the election forms. Appellant, Ally Financial, Inc. ("Ally") provided election forms executed by the retailers that sold the motor vehicles at issue in Ally's tax refund claim and that reported and remitted the sales tax to the Department. The election forms designated Ally as the party that could claim the tax refund under MCL 205.54i. The Department refused to accept the election forms because they were signed by the retailers after the accounts had been written off Ally's books and records, contending that because of certain specific language in the election forms, the forms did not apply to accounts that had been written off. Did the Court of Appeals err in interpreting the language of the election forms provided by Ally to hold that the election forms did not apply to accounts written off prior to the retailers' execution of the forms?

Court of Appeals answer: No

Appellants' answer: Yes

Appellee's answer: No

STATEMENT OF ORDER APPEALED FROM, GROUNDS AND RELIEF SOUGHT

Appellants seek leave to appeal from the Court of Appeals' September 20, 2016 opinion affirming the Court of Claims' grant of summary disposition in favor of the Department and against Appellants in their respective cases.

The issues presented in this Application satisfy MCR 7.305(B)(2) because they hold significant public interest and are against an agency of the State. Specifically, the Court of Appeals' opinion in this case, if upheld, would result in Michigan taxpayers losing their right to a refund or deduction on bad debt accounts to which they are entitled under MCL 205.54i. A 2007 amendment to the statute was enacted to expressly permit lenders, such as Appellants, to receive sales tax refunds of tax paid that the lenders never collected. Disallowing any refund for accounts where the lenders previously repossessed the collateral would result in such a substantial reduction in the amount of sales tax refunds, so as to render the 2007 legislation meaningless.

The issues presented in this Application also satisfy MCR 7.305(B)(3) because they involve legal principles of major significance to the State's jurisprudence. The Court of Appeals' opinion in this case would render the 2007 amendment to MCL 205.54i meaningless and make Michigan's law inconsistent with the laws in all other states, including the Streamlined Sales Tax Member States.

Finally, the issues presented in this Application satisfy MCR 7.305(B)(5)(a) because the Court of Appeals' decision in this case is clearly erroneous and will cause material injustice to Appellants and other similarly situated taxpayers.

The requirements of MCR 7.305(B) are met, and this Court should grant leave to appeal, or alternatively, peremptorily reverse the Court of Appeals' opinion in this case.

STATEMENT OF PROCEEDINGS AND FACTS

Ally is a Delaware corporation, formerly known as GMAC, authorized to do business in Michigan. (Verified Complaint filed in Lower Court Docket No. 13-000049-MT ("Ally Compl.") at ¶ 1; Affidavit of Jeffrey S. Katz filed in Lower Court Docket No. 13-000049-MT ("Katz Aff.") at ¶ 3).[1] Appellant/Plaintiff, Santander Consumer USA, Inc. ("Santander"), is an Illinois corporation authorized to do business in Michigan. (Verified Complaint filed in Lower Court Docket No. 13-000113-MT ("First Santander Compl.") at ¶ 1; Verified Complaint filed in Lower Court Docket No. 13-000114-MT ("Second Santander Compl.") at ¶ 1.) Santander acquired certain assets of CitiFinancial Auto Ltd. and CitiFinancial Auto Corporation (collectively "CitiFinancial"), including the refund claims discussed herein. (*Id*.)

Ally and CitiFinancial, Santander's predecessor-in-interest, financed the purchase of motor vehicles from various vehicle dealers in Michigan. (Ally Compl. at ¶ 8; Katz Aff. at ¶ 3; First Santander Compl. at ¶ 13; Second Santander Compl. at ¶ 13.) The vehicle purchasers entered into retail installment contracts with the dealers to finance their purchase. (*Id*.) In the finance contracts, the purchasers agreed to pay the entire amount financed over time in fixed installments. (Ally Compl. at ¶ 9; Katz Aff. at ¶ 3; First Santander Compl. at ¶ 14; Second Santander Compl. at ¶ 14). The amount financed was the total purchase price of the vehicle plus the total sales tax due on the sale, minus any down payment. (Ally Compl. at ¶ 10; Katz Aff. at ¶ 3; First Santander Compl. at ¶ 14; Second Santander Compl. at ¶ 14). Down payments were applied pro rata between the total purchase price and the total sales tax. (*Id*.).

Contemporaneously with the execution of the finance contracts, the dealers assigned all of their rights, title, and interests in the contracts, without recourse, to Ally or CitiFinancial.

[1] In 2009, GMAC, LLC converted to GMAC, Inc., and on May 10, 2010 GMAC, Inc. changed its name to Ally Financial, Inc. Plaintiff, Ally Financial, is the successor in interest to GMAC, LLC. (Ally Compl. at ¶ 1).

(Ally Compl. at ¶ 11; Katz Aff. at ¶ 4; First Santander Compl. at ¶ 15; Second Santander Compl. at ¶ 15). In exchange for the assignments, Ally and CitiFinancial paid the entire amount financed, including the sales tax, to the dealers. (Ally Compl. at ¶ 12; Katz Aff. at ¶ 4; First Santander Compl. at ¶ 16; Second Santander Compl. at ¶ 16). The dealers then reported and remitted to the State of Michigan the sales tax due on these motor vehicle sales. (Ally Compl. at ¶ 12; Katz Aff. at ¶ 4).

Some borrowers, however, defaulted and did not repay the full amount of the purchase price and the financed sales tax. (Ally Compl. at ¶ 13; Katz Aff. at ¶ 5; First Santander Compl. at ¶ 21; Second Santander Compl. at ¶ 21). After reasonable attempts to collect the balances on the defaulted finance contracts, Ally and CitiFinancial determined that some were worthless and uncollectible. (Ally Compl. at ¶ 15; Katz Aff. at ¶ 6; First Santander Compl. at ¶ 23; Second Santander Compl. at ¶ 23). Ally and CitiFinancial repossessed the majority of the vehicles that secured the defaulted finance contracts. (Ally Compl. at ¶ 14; Katz Aff. at ¶ 7; First Santander Compl. at ¶ 22; Second Santander Compl. at ¶ 22). If a repossessed vehicle was successfully sold, Ally and CitiFinancial applied the sale proceeds to the amount outstanding under the finance contracts. (*Id.*). Many times, even after the application of any repossession sales proceeds, the finance contracts still had unpaid balances. (*Id.*). Ally and CitiFinancial claimed the remaining balances on these defaulted finance contracts as bad debts, pursuant to § 166 of the Internal Revenue Code, on their federal income tax returns. (Ally Compl. at ¶ 16; Katz Aff. at ¶ 8; First Santander Compl. at ¶ 23; Second Santander Compl. at ¶ 23).

On August 16, 2010, Ally filed a refund claim for $5,675,115 (the "Ally Claim") with the Michigan Department of Treasury. (Ally Compl. at ¶ 17 and Exhibit A). The Ally Claim was for the unrepaid sales taxes resulting from the defaulted finance contracts that Ally and its

predecessor had written off for the period of January 1, 2007 to June 30, 2010. (Compl. at ¶ 17; Katz Aff. at ¶ 6). On or about May 24, 2011, CitiFinancial filed two separate refund claims with the Michigan Department of Treasury, one in the amount of $41,879.21 ("Santander Claim 1") and the second in the amount of $563,444.60 ("Santander Claim 2" and collectively with Santander Claim 1, the "Santander Claims). (First Santander Compl. at ¶ 9 and Exhibit A; Second Santander Compl. at ¶ 9 and Exhibit A). The Santander Claims were for the unrepaid sales taxes resulting from the defaulted finance contracts that Santander's predecessors had written off for the period of January 1, 2010 through December 31, 2010. (*Id*.)

In response to each of the refund claims submitted by Ally and Santander, the Department requested additional documentation to support the claims. (Department's Brief in Support of Motion for Summary Disposition filed in Lower Court Docket No. 13-000049-MT (Dep't Ally Br.") at Exhibit 2, p. 2;[2] Brief in Support of Defendant Michigan Department of Treasury's October 27, 2014 Motion for Summary Disposition filed in Lower Court Docket No. 13-113-MT ("Dep't First Santander Br.") at Exhibit 2; Brief in Support of Defendant Michigan Department of Treasury's October 27, 2014 Motion for Summary Disposition filed in Lower Court Docket No. 13-114-MT ("Dep't Second Santander Br.") at Exhibit 2). Specifically, for each claim the Department requested copies of RD-108 forms (Application for Michigan Title & Registration – Statement of Vehicle Sale) for each vehicle purchase included in the Ally Claim and the Santander Claims. (Dep't Ally Br. at Exhibit 3, ¶ 9; Dep't First Santander Br. at Exhibit 5, ¶ 9; Dep't Second Santander Br. at Exhibit 5, ¶ 9). Because the motor vehicle dealers prepare and submit the RD-108 forms to the State, Ally and Santander generally do not have copies of these forms and they are not documents regularly maintained in Ally's and Santander's business

[2] The Department denied the portion of the Ally Claim for bad debts written off prior to October 1, 2009, Ally does not dispute that denial, and that period is no longer at issue in this case.

records. Ally and Santander submitted RD-108 forms for some of the accounts included in their claims and for others submitted copies of the installment agreements showing the taxes paid. (Dep't Ally Br. at Exhibit 3, ¶ 10; Dep't First Santander Br. at Exhibit 5, ¶ 11; Dep't Second Santander Br. at Exhibit 5, ¶ 11).

The Department also requested that Ally and Santander remove the portion of the claims for any defaulted account for which the motor vehicle securing the account was repossessed. (Dep't Ally Br. at Exhibit 3, ¶ 8; Dep't First Santander Br. at Exhibit 5, ¶ 9; Dep't Second Santander Br. at Exhibit 5, ¶ 9). Ally and Santander provided the Department with spreadsheets that showed the amount of their claims excluding repossessed vehicles. (Dep't Ally Br. at Exhibit 3, ¶ 10; Dep't First Santander Br. at Exhibit 5, ¶ 11; Dep't Second Santander Br. at Exhibit 5, ¶ 11). With the reduction of the Ally Claim to exclude accounts written off prior to September 30, 2009 and repossessed vehicles, the Ally Claim totaled $306,281.11. (Dep't Ally Br. at Exhibit 3, ¶ 10).

In order to comply with MCL 205.54i, Ally requested that the motor vehicle dealers with whom it does business in Michigan execute written election forms designating Ally as the entity entitled to the bad debt sales tax refund. (Affidavit of Andrew R. Muhn ("Muhn Aff.") at ¶ 3). Copies of written election forms Ally obtained from Michigan dealers who sold vehicles included in Ally's claim are attached to the Muhn Affidavit (the "Dealer Election Forms"). Ally has obtained Dealer Election Forms from 145 dealers included in the Ally Claim. (Muhn Aff. at ¶ 4). The Department's position, upheld by the Court of Claims and the Court of Appeals, is that the election forms do not apply to the Ally Claim because the election forms were executed after the accounts that comprise the claim were written off Ally's books and records.

The Department denied the Ally Claim, First Santander Claim, and Second Santander Claim in their entirety. (Dep't Ally Br. at Exhibit 4; Dep't First Santander Br. at Exhibit 12; Dep't Second Santander Br. at Exhibit 12). After requesting informal conferences with the Department pursuant to the procedure provided by MCL 205.21a, the Department upheld its denials of the refund claims. (Ally. Compl. at Exhibit B; Dep't First Santander Br. at Exhibit 13; Dep't Second Santander Br. at Exhibit 13.)

On or about April 12, 2013, Ally filed its Verified Complaint in the Court of Claims to appeal the Department's decision. (Ally. Compl.). On August 20, 2013, Santander filed the First Santander Complaint and Second Santander Complaint in the Court of Claims to appeal the Department's decisions. (First Santander Compl.; Second Santander Compl.) In each case, the parties filed cross-motions for summary disposition and the Court of Claims entered judgment in favor of the Department in each case.

On June 9, 2015, Ally filed its appeal of the Court of Claims' judgment to the Court of Appeals. On June 10, 2015, Santander filed its appeals of the Court of Claims' judgments to the Court of Appeals. The Court of Appeals consolidated the Ally and two Santander appeals and issued one opinion affirming the Court of Claims' decision in all three cases.

ARGUMENT

This case involves a lender's right to a tax refund under the current version of MCL 205.54i, which was amended effective October 1, 2009. When the Michigan Legislature amended this statute, it expressed the unequivocal intent to grant lenders, such as Ally and Santander, the right to obtain a refund of sales tax attributable to bad debts on the purchases that the lenders financed. Despite this clear legislative intent, the Department nevertheless continues to put up road blocks to such claims brought by lenders by imposing requirements the lenders

cannot meet and by imposing limitations in clear violation of the statute in such a way as to render it nearly meaningless.

In *DaimlerChrysler Services North America LLC v Dep't of Treasury*, 271 Mich App 625; 723 NW2d 569 (2006), the Court of Appeals held that a motor vehicle lender was entitled to a refund for bad debts under the prior version of MCL 205.54i. Following that decision, the Michigan Legislature amended that statute to clarify that its original intent was that only the retailers, and not the lenders, were entitled to this tax refund. However, as part of that amendment that became effective on October 1, 2009, the Legislature expanded the statute and added a specific provision that prospectively allowed either the lender or the retailer to obtain the sales tax refund.

Specifically, the Legislature expressly added new subsection (3). This section recognizes that it is not fair to allow the state to keep the sales tax attributable to bad debts on financed transactions, and it recognizes that the retailer or lender should be able to obtain a refund of the overpaid taxes. This new subsection allows the retailer and the lender to jointly elect which of them is the party that is entitled to obtain the refund. They accomplish this result by making a joint election, which ensures that both parties agree to whom the refund should be issued and prevents the Department from receiving competing claims. In this case, the retailers and lenders executed written election forms directing that Ally and Santander are entitled to the refund.

Despite the unequivocal voice of the Michigan Legislature declaring that lenders are entitled to these sales tax refunds under the new version of MCL 205.54i, the Department continues to actively oppose such claims in part by creating unnecessary obstacles to such refund claims. It is not within the Department's authority to contravene the Legislature's express intent

by erecting barriers that effectively prevent any lender from ever successfully obtaining a refund under the amended statute, which is what the Department has attempted in this case.

The Court of Appeals opinion is clearly erroneous in holding that Ally and Santander are not entitled to sales tax refunds under MCL 205.54i because: (1) the Department's interpretation of bad debt under the statute to exclude all repossessed property, regardless of whether a deficiency remained after repossession, is contrary to the statutory language and to the interpretation of all other states that have interpreted similar statutory language, (2) Ally and Santander provided sufficient evidence to support that the sales tax they seek to have refunded was previously paid to the Department, and the Department's further demand for RD-108 forms is unreasonable, and (3) the election forms provided by Ally are sufficient to meet the requirements of the statute. Thus, Ally and Santander have proven their entitlement to sales tax refunds, and the decision by the Court of Appeals should be reversed.

I. The Application for Leave to Appeal Should Be Granted Pursuant to MCR 7.305(B)(2) Because the Court of Appeals' Opinion Upholds Limitations Imposed in Clear Violation of a Michigan Statute Which the Legislature Could Not Have Intended.

A. Standard of Review

The issues in this case are issues of statutory interpretation, which are questions of law. The Supreme Court reviews questions of statutory interpretation *de novo*. *Potter v McLeary*, 484 Mich 397, 410; 774 NW2d 1, 8 (2009). The Court also reviews a trial court's decision on summary disposition *de novo*. (*Id*.)

B. MCL 205.54i Allows for the Recovery of Sales Tax On the Net Unpaid Balances of Accounts Where Collateral is Repossessed

In an issue of statutory construction, the Court must determine whether the Department correctly interpreted MCL 205.54i as prohibiting a refund of the sales tax paid on accounts for which (1) the financed motor vehicle was repossessed after default and (2) a deficiency balance remained on the account after sale of the repossessed vehicle.

Sometimes Ally's and Santander's customers default in their payments and in most instances when this happens, Ally and Santander repossess the vehicle serving as collateral for the account. They then sell the vehicle and apply the proceeds to reduce the customer's outstanding balance on the account. However, often times, an outstanding balance remains due and owing on the account because the sale of the repossessed vehicle did not realize sufficient proceeds to cover the outstanding balance in full. In this case, Ally and Santander are seeking refunds of sales tax attributable to the balances remaining, after the proceeds of the repossessions are applied. That is, they are seeking refunds of sales tax attributable to their actual economic loss, but are not seeking refunds of sales tax attributable to the portion of the unpaid balance that they recouped through the sale of the repossessed vehicle.

The Department interprets MCL 205.54i as excluding a tax refund on *any* account where the motor vehicle securing the loan has been repossessed, regardless of whether an outstanding balance remained after the sale of the repossessed vehicle. The Court of Appeals deferred to the Department's interpretation of the statute stating that it was consistent with the language of the statute. It also cited to its earlier unpublished opinion in *DaimlerChrysler Services of North America, LLC v Department of Treasury*, unpublished opinion per curiam of the Court of Appeals, issued January 21, 2010 (Docket No. 288347) in which the Court of Appeals also deferred to the Department's interpretation of the statute. However, just because the Department

has a long-standing interpretation of a statute, does not mean that the Department's interpretation is correct.

In fact, the Department's interpretation is not correct or in accord with the purpose behind MCL 205.54i. It is also contrary to the way in which every other state, including some with identical statutory language, treats bad debts on repossessed collateral. The Department offers no rationale for its interpretation, let alone any explanation for why any deference should be given to an interpretation that is contrary to the language of the statute and the treatment of all the other states which have similar statutes. Michigan stands alone on this issue. Therefore, the Court should decline to follow the Department's interpretation.

C. The Department's Interpretation of MCL 205.54i(1) is Not Consistent With the Plain Language and the Purpose of the Statute

The relevant portion of MCL 205.54i provides:

> (1) As used in this section:
>
> (a) "Bad debt" means any portion of a debt that is related to a sale at retail taxable under this act for which gross proceeds are not otherwise deductible or excludable and that is eligible to be claimed, or could be eligible to be claimed if the taxpayer kept accounts on an accrual basis, as a deduction pursuant to section 166 of the internal revenue code, 26 USC 166. A bad debt shall not include any finance charge, interest, or sales tax on the purchase price, uncollectible amounts on property that remains in the possession of the taxpayer until the full purchase price is paid, expenses incurred in attempting to collect any account receivable or any portion of the debt recovered, any accounts receivable that have been sold to and remain in the possession of a third party for collection, and repossessed property.
>
> * * *
>
> (2) In computing the amount of tax levied under this act for any month, a taxpayer may deduct the amount of bad debts from his or her gross proceeds used for the computation of the tax. The amount of gross proceeds deducted must be charged off as uncollectible on the books and records of the taxpayer at the time the debt becomes worthless and deducted on the return for the period during which

> the bad debt is written off as uncollectible in the claimant's books and records and must be eligible to be deducted for federal income tax purposes. . . .

MCL 205.54i (emphasis added). The first sentence of § 205.54i(1) defines "bad debt" as a debt that is eligible to be claimed as a bad debt for federal income tax purposes pursuant to 26 USC 166. The second sentence of § 205.54i(1) deals with computing the amount of the bad debt for purposes of claiming a sales tax refund under MCL 205.54i. These adjustments are designed to ensure that the taxpayer only obtains a sales tax refund for that portion of the bad debt upon which sales tax was originally paid to the Department and on only those portions for which the taxpayer incurred an actual economic loss.

The enumerated items in the second sentence exclude (1) finance charges, interest and sales tax paid on the purchased property and (2) expenses incurred in attempting to collect the bad debt. These were items on which the financing company did not pay sales tax. While they are bad debts for purposes of computing its federal income tax liability, there is no associated sales tax on these items to allow the financing company to obtain a sales tax refund.

The remaining items exclude (3) uncollectible amounts on accounts for which the purchased goods remain in the possession of the lender, i.e., goods purchased on "layaway," logically because the seller has suffered no actual loss as the property is still in unsold and therefore undepreciated form; (4) any portion of the bad debt that the lender recovered; (5) any bad debts that have been sold to a third party for collection; and (6) repossessed property. These are items on which the taxpayer did not truly suffer any economic loss, and it is logical not to permit the taxpayer to obtain a refund of sales taxes on these items.

When collateral is repossessed, the lender does not suffer an economic loss on the entire defaulted amount because it recoups some of that loss through the repossession and subsequent

sale of the vehicle. It does, however, suffer an economic loss for the remaining unpaid balance after the value of the repossessed property is applied against the total debt. It is the portion of the bad debt that remains, after excluding the value of the repossessed property, upon which Ally and Santander seek a sales tax refund pursuant to MCL 205.54i.[3] Ally and Santander previously paid sales tax on this amount and did not recover this amount through any means, which constitutes an actual economic loss.

Therefore MCL 205.54i(1) allows lenders, such as Ally and Santander, to claim a refund for this remaining loss after the application of the value of the repossessed property. The express language of the second sentence of § 205.54i excludes the "repossessed property" from the amount of the bad debt losses. It does not exclude the entire original purchase price of the transaction, nor does it exclude the remaining balance after reducing it by the value of the repossessed property. The Department's interpretation is nonsensical in light of the specific statutory language and the purpose of the statute and, therefore, is incorrect. See, e.g., *People v Garrison*, 495 Mich 362, 367; 852 NW2d 45 (2014) (absent ambiguity in a statute, the court assumes that the Legislature intended for the words in the statute to be given their plain meaning, and the court enforces the statute as written); see also *Marie De Lamielleure Trust v Treasury Dep't*, 305 Mich App 282, 284; 853 NW2d 708 (2014) (statute must be read according to its plain and ordinary meaning); *Speicher v Columbia Tp Bd of Trustees*, 497 Mich 125, 134; 860 NW2d 51 (2014) (the court's goal is to give effect to the intent of the Legislature by focusing on a statute's plain language).

[3] For example, if a customer purchased a vehicle for $20,000 and owes $8,000 when the customer defaults on the loan, the lender is entitled to repossess the vehicle and apply the proceeds of the repossession against the loan. If the lender obtains $5,000 for the vehicle, then its resulting loss is $3,000, and it should be entitled to a refund of sales tax on the $3,000. The Department's position is that the lender is not entitled to any refund even though the lender has a bad debt loss of $3,000.

Another result of the Department's position is that Ally and Santander *would* be entitled to a full bad debt refund if they: (1) refused to repossess the vehicle, (2) failed to repossess the vehicle, or (3) failed to find the vehicle. However, Ally and Santander *would not* be entitled to any refund if (1) they successfully repossessed the vehicle, (2) they sold the vehicle for $100, and (3) the unpaid purchase price upon which tax was paid was $25,000. Allowing a taxpayer to obtain a sales tax refund when it is unable to repossess the collateral and suffers an economic loss, but not allowing a taxpayer a sales tax refund when it does repossess the collateral and suffers an economic loss, simply does not make any sense.

D. Every Other State With Identical Language in Their Bad Debt Refund Statutes Interprets the Language Contrary to that of the Department's Interpretation

Many states, including Michigan, have identical "repossessed property" language in their bad debt sales tax refund statutes because they are required to use that language as part of their participation in the Streamlined Sales and Use Tax Agreement (SSUTA). *See* Streamlined Sales and Use Tax Administration Act, 2004 PA 174 and 2004 PA 173; *see also* Streamlined Sales and Use Tax Agreement Adopted November 12, 2002, as amended through May 15, 2014 (Santander's Brief in Response to Defendant; Department of Treasury's October 27, 2014 Motion for Summary Disposition filed in Lower Court Docket No. 13-113 MT ("Santander's Br.") at Exhibit 2). SSUTA is a national program that is designed to provide uniformity among the sales tax law of participating states and to ease the costs and burdens for retailers and other entities that operate in multiple states. See <http://www.streamlinedsalestax.org/index.php?page=About-Us> (accessed October 24, 2016). Twenty-four states and the District of Columbia are members to SSUTA. SSUTA provides a model sales tax statute to address

various areas of sales tax law and Michigan has conformed its laws to SSUTA. See Act 175 of 2004, MCL 205.171, et. seq.

The language in MCL 205.54i correlates directly with the SSUTA. Section 320 of the SSUTA, which is titled "Uniform Rules for Recovery of Bad Debts," provides:

> Each member state shall use the following to provide a deduction for bad debts to a seller. To the extent a member state provides a bad debt deduction to any other party, the same procedures will apply. Each member state shall:
>
> A. Allow a deduction from taxable sales for bad debts. Any deduction taken that is attributed to bad debts shall not include interest.
>
> B. Utilize the federal definition of "bad debt" in 26 U.S.C. Sec. 166 as the basis for calculating bad debt recovery. However, the amount calculated pursuant to 26 U.S.C. Sec. 166 shall be adjusted to exclude: financing charges or interest; sales or use taxes charged on the purchase price; uncollectable amounts on property that remain in the possession of the seller until the full purchase price is paid; expenses incurred in attempting to collect any debt, and repossessed property.

See Santander's Br. at Exhibit 2, Section 320, p. 41 (emphasis added).

Most, if not all, states belonging to SSUTA, including Michigan, have identical "repossessed property" language in their bad debt statutes. As far as Ally and Santander can determine, six of those states published regulations or other guidance specifically interpreting the "repossessed property" language, and all of them interpret the language to only exclude the amount recovered by the lender from the sale of the repossessed property in the calculation of the bad debt – not to completely exclude a refund claim as the Department does. For example, Wisconsin Statute 77.585(1)(a) contains similar language to MCL 205.54i:

> Bad Debt does not include financing charges or interest, sales or use taxes imposed on the sales price or purchase price, uncollectible amounts on tangible personal property or items, property or goods under s. 77.52(1)(b), (c) or (d) that remain in the

> seller's possession, until the full sales price or purchase price is paid, expenses incurred in attempting to collect any debt, debts sold or assigned to third parties for collection and repossessed property or items.

Wis Stat 77.585(1)(a) (2013-14). The Wisconsin Department of Revenue has interpreted the "repossessed property" language in its bad debt statute to mean that the amount of the bad debt is to be reduced by the value of the repossessed property. Wisconsin Administrative Code Tax 11.30(f) provides:

> *Repossessions. When property, items, or goods on which a receivable exists are repossessed, a bad debt deduction is allowable only to the extent that the seller sustains a net loss of the sales price upon which tax was paid.* A net loss occurs when the sum of the pro rata portion of all payments, credits and the wholesale value of the repossessed property, item, or good attributable to the cash sales price of the property, item, or good, is less than the cash sales price upon which sales or use tax was paid.

Wis Admin Code Tax 11.30(f) (emphasis added). The regulation then provides an example of a reduction in the amount of the bad debt incurred by a lender by the application of the wholesale value of the repossessed property.

Likewise, Tennessee has the same "repossessed property" language in its statute, but also interprets the language contrary to the Department's interpretation. Tennessee Code 67-6-507(e)(2) provides:

> For purposes of calculating the deduction, a "bad debt" is as defined in 26 U.S.C. § 166. However, the amount calculated pursuant to 26 U.S.C. § 166 shall be adjusted to exclude: financing charges or interest, sales or use taxes charged on the purchase price, uncollectible amounts on property that remain in the possession of the seller until the full purchase price is paid, expenses incurred in attempting to collect any debt, and repossessed property.

Tenn Code Ann. 67-6-507(e)(2) (2014). The Tennessee Department of Revenue has interpreted the "repossessed property" language to mean that the amount of the bad debt is reduced by the

value of the repossessed property – not that the refund or deduction of sales tax is completely barred. Tennessee State Sales and Use Tax Rule 1320-5-1-52 provides:

> The unpaid balance to be considered in the calculation of the repossession credit allowed by T.C.A. 67-6-507(d) is only that which constitutes principal, and shall not include interest, carrying charges or any similar charges. Any dealer claiming such a deduction or deductions shall preserve, as part of the official records of his business, full information concerning the sale and subsequent repossession of the subject item of personal property; information shall include identification of parties and items involved, the dates of the sale and repossession, the amount of the original price to the purchaser upon which sales tax was due to be paid, and *the amount of unpaid balance which forms the basis for the deduction*.

Tenn Comp R & Regs 1320-5-1-52(1) (2008) (emphasis added).[4]

Other states that have interpreted the same language in their respective bad debt statutes – North Dakota, Nebraska, Ohio, and Washington – interpret that language just as Wisconsin and Tennessee.

North Dakota: ND Cent Code § 57-39.4-21 (2015) provides, in relevant part:

> Each member state shall: . . . 2. Utilize the federal definition of "bad debt" in 26 U.S.C. 166 as the basis for calculating bad debt recovery. However, the amount calculated pursuant to 26 U.S.C. 166 shall be adjusted to exclude financing charges or interest, sales or use taxes charged on the purchase price, uncollectible amounts on property that remain in the possession of the seller until the full purchase price is paid, expenses incurred in attempting to collect the debt, and <u>repossessed property</u>.

ND Admin Code 81-04.1-01-20 provides, in relevant part:

> . . . When retailers sell tangible personal property on time payments, and it becomes necessary for the retailer to repossess the tangible personal property, the transaction is handled as follows:
>
> 1. If the retailer previously included the total selling price of the tangible personal property in the retailer's gross sales and remitted

[4] *See also* NJ Stat Ann 54:32B-12.1(c) (2015); Kan Stat Ann 79-3674(b) (2015) and Kan Admin Regs 92-19-3bd(b)(5).

> tax to the tax commissioner but did not collect sales tax from the buyer, the retailer may enter a credit in the amount of the unpaid balance of the original sale. . . .

Nebraska: Neb Rev Stat 77-2708(2)(j)(i) (2014) provides:

> Credit shall be allowed to the retailer, contractor, or repairperson for sales or use taxes paid pursuant to the Nebraska Revenue Act of 1967 on any deduction taken that is attributed to bad debts not including interest. Bad debt has the same meaning as in 26 U.S.C. 166, as such section existed on January 1, 2003. However, the amount calculated pursuant to 26 U.S.C. 166 shall be adjusted to exclude: Financing charges or interest; sales or use taxes charged on the purchase price; uncollectible amounts on property that remains in the possession of the seller until the full purchase price is paid; and expenses incurred in attempting to collect any debt and repossessed property.

316 Neb. Admin. Code § 1-027.02 provides: "Credit for the amount of taxes paid on such unpaid portion of the purchase price of the repossessed property shall be taken on a return filed within a reasonable time after the property has been repossessed."

Ohio: Ohio Rev Code Ann 5739.121 (West 2015) provides:

> (A) As used in this section, "bad debt" means any debt that has become worthless or uncollectible in the time period between a vendor's preceding return and the present return, has been uncollected for at least six months, and that may be claimed as a deduction pursuant to the "Internal Revenue Code of 1954," 68A Stat. 50, 26 U.S.C. 166, as amended, and regulations adopted pursuant thereto, or that could be claimed as such a deduction if the vendor kept accounts on an accrual basis. "Bad debt" does not include any interest or sales tax on the purchase price, uncollectible amounts on property that remains in the possession of the vendor until the full purchase price is paid, expenses incurred in attempting to collect any account receivable or for any portion of the debt recovered, and repossessed property.

Ohio Admin Code 5703-9-44(A) provides:

> The amount of the bad debt is equal to the price, or portion thereof, of the tangible personal property that is uncollectible. No amount can be excluded as a bad debt that represents: . . . (7) Any uncollectible amount on property repossessed by or on behalf of the vendor.

Washington: Wash Rev Code 82.08.037 (2015) provides: "(1) A seller is entitled to a credit or refund for sales taxes previously paid on bad debts, as that term is used in 26 U.S.C. Sec. 166 . . . . (2) For purposes of this section, "bad debts" does not include: . . . (d) Repossessed property." Wash Admin Code 458-20-196(2) provides:

> (2) Retail sales and use tax.
> (a) General rule. Under RCW 82.08.037 and 82.12.037, sellers are entitled to a credit or refund for sales and use taxes previously paid on "bad debts" under section 166 of the Internal Revenue Code . . . . However, "bad debts" do not include: . . .
> (iv) The value of repossessed property taken in payment of debt.

Each of these six states has language dealing with repossessed property in their bad debt tax refund statutes similar to that found in Michigan's statute. However, each and every one of these states correctly notes that the amount of the bad debt is to be reduced by the value of the repossessed property, and the fact that the lender repossessed collateral does not bar a refund claim. The Department's interpretation of "repossessed property" is unreasonable, and it is inconsistent with Michigan's statutes and the interpretation of all of the other SSUTA states that have expressly addressed this same language. The purpose of the SSUTA is to promote uniformity among the states in connection with their sales and use tax administration. The fact that the Department's interpretation of MCL 205.54i is contrary to that of member states with similar statutes does not promote this uniformity and is also a strong indication that it is legally erroneous.

Moreover, Ally and Santander have searched the statutes of other states that are not members of the Streamlined Sales and Use Tax Agreement, and have not found any statutes or regulations that follow the Department's position in this case. As a result, it appears that no other state in the country follows the Department's interpretation. This survey supports the conclusion that the Department's interpretation is unreasonable. Indeed, an examination of the

source documents where the Department first enunciated its interpretation shows that there is no rationale behind it. The Department first set forth its interpretation of MCL 205.54i in Revenue Administrative Bulletin 1989-61. However, RAB 1989-61 provides no reasoning or rationale to support the Department's interpretation of MCL 205.54i and simply states the Department's rule.

E. The Department Has No Reasonable Rationale For Its Interpretation of MCL 205.54i

The Court of Appeals relied on its previous unpublished opinion in *DaimlerChrysler Services of North America, LLC v Department of Treasury*, unpublished opinion per curiam of the Court of Appeals, issued January 21, 2010 (Docket No. 288347), in, again, affirming the Department's interpretation of the statute. The panel in *DaimlerChrysler* appeared to rely on two points to hold that MCL 205.54i excludes refunds for repossessed property accounts: first, that the statute was plain and unambiguous, and second, that the Department's interpretation of the statute was entitled to respectful consideration. However, the *DaimlerChrysler* panel's decision was conclusory and adopted the Department's interpretation of the statute without any real analysis. Neither the panel in *DaimlerChrysler*, nor the panel in this case, appeared to consider: (1) the fact that the Department's interpretation of "repossessed property" is contrary to every other state's interpretation with similar language in their respective bad debt statutes, and (2) that the goal of the Streamlined Sales Tax Act is to promote uniformity among the states.

With respect to the Department's interpretation, "[a]lthough this Court affords deference to the construction of statutory provisions by any particular department of the government and used for a long period, the department's interpretation 'is not binding on this Court and cannot be used to overcome the statute's plain meaning . . . .'" *Catalina Mktg Sales Corp v Dep't of Treasury*, 470 Mich 13, 23-4; 678 NW 2d 619, 626 (2004) (internal citations omitted). *See also Nason v State Emp Ret Sys*, 290 Mich App 416, 424-25; 801 NW2d 889, 894 (2010) (while "a

court must consider an agency's interpretation of a statute, 'the court's ultimate concern is a proper construction of the plain language of the statute'") (internal citations omitted).

In *Catalina Marketing Sales Corp.*, the Court rejected the Department's interpretation set forth in a Revenue Administrative Bulletin of the phrase "sale at retail" under the General Sales Tax Act. The Court noted that a Revenue Administrative Bulletin is not enacted under the Michigan Administrative Procedures Act and, thus, does not have the force of law. 470 Mich at 23. *Catalina Marketing* makes clear that a court must do more than defer to the Department's interpretation – a court must ensure that the Department's position is consistent with the plain language of the statute and the purpose behind the statute. See also *Elias Brothers Restaurants, Inc v Treasury Dept*, 452 Mich 144, 152; 549 NW2d 837 (1996) (refusing to give deference to the Department's interpretation of "retailer" in the use tax statute because the Department's interpretation "appears to contravene the clear and fundamental legislative intent" of the statute).

As the Court of Appeals explained in *Bachman v Dep't of Treasury*, 215 Mich App 174, 182; 544 NW2d 733 (1996), superseded by statute on other grounds as recognized in *Wisne v Dept of Treasury*, 244 Mich App 342; 625 NW2d 401 (2001):

> Generally, this Court will accord deference to the construction placed upon statutory provisions by any particular department of government for a long period. However, the principle that a longstanding interpretation of a statute by the agency that administers it is entitled to great weight does not control where the interpretation is clearly wrong.

215 Mich App at 182 (citations omitted). See also *Sagar Trust v Dept of Treasury*, 204 Mich App 128; 514 NW2d 514 (1994) (same).

The court in *DaimlerChrysler* and the court in this case did not engage in their own analysis of the statute but, instead, simply deferred to the Department's position first set forth in

its Revenue Administrative Bulletin 1989-61. RAB 1989-61 provides no reasoning or rationale to support the Department's interpretation of MCL 205.54i. It contains no analysis of the statute or alternative interpretations. The RAB simply states that bad debts do not include sales tax charged on property that is subsequently repossessed, without any further explanation. Therefore, it is not appropriate to give any weight to the Department's interpretation of this statute both because its interpretation was rendered only in a revenue administrative bulletin (and not in a rule that has the force of law) and because there is no reasoning behind the revenue administrative bulletin to justify the interpretation.

The Court of Appeals in this case stated that the "Department's interpretation is consistent with the plain and unambiguous language of the bad debt statute." Slip. Op. at 12. To the contrary, the Department's interpretation does not make sense in light of the plain and unambiguous language of the statute. MCL 205.54i excludes "repossessed property" from the definition of bad debt. Repossessed property refers to the property serving as collateral for the account. The word "property" is defined as, "something owned or possessed" and "something to which a person or business has legal title." *Merriam-Webster's Dictionary*, <http://www.merriam-webster.com/dictionary/property> (accessed October 21, 2016). "Repossess" is defined as "to regain possession of" and "to take possession of (something bought) from a buyer in default of the payment of installments due." *Merriam-Webster's Dictionary*, <http://www.merriam-webster.com/dictionary/repossess> (accessed October 21, 2016). The plain and unambiguous language of the statute excludes the collateral securing the account from the definition of "bad debt" – it does not exclude the entire account from the definition.

To take the Department's interpretation to its logical extension and applying the Department's interpretation of "repossessed property" to each of the other items excluded from the definition of "bad debt" in MCL 205.54i would mean that a taxpayer would not be able to obtain a refund of sales tax on any account on which interest was charged, on any account on which sales tax was paid, or any account for which the taxpayer incurred expenses trying to collect the account. Applying the Department's interpretation of "repossessed property" to the other items excluded from the definition of bad debt in the statute would bar a tax refund on all accounts, because every retail installment account incurs interest and every account (for which a tax refund would be sought) has sales tax imposed on the purchase. Thus, under the Department's interpretation of the statute, if applied to all items excluded from the definition of bad debt, no taxpayer would be able to obtain a refund of sales tax on any account ever, which would render the statute meaningless.

This Court should not adopt the Department's interpretation of "repossessed property" in MCL 205.54i because it violates the plain language of the statute and the legislative intent behind this provision. All other states that have considered this issue have interpreted the statute the way that Ally and Santander do, which is consistent with the underlying language and purpose of the statute. In contrast, there is no rationale that underlies the Department's interpretation. There is therefore no reason for this Court to afford any deference to that interpretation, let alone adopt it, and there are more compelling reasons for the Court to adopt the interpretation advocated by Ally and Santander.

II. The Application for Leave to Appeal Should Be Granted Pursuant to MCR 7.305(B)(2) Because the Court of Appeals Upheld Requirements Imposed by the Department That Are Not In the Statute.

A. Standard of Review

See Section II.A. above.

B. Ally and Santander Proved That Sales Tax Was Paid on Each of the Motor Vehicles Included In Their Claims.

The Court of Appeals erred in ruling that the Department can arbitrarily require the lender to provide a specific document to prove sales tax was paid on the retail transaction when Ally and Santander already provided other sufficient documentation to prove that the tax was paid. The pertinent portion of MCL 205.54i states, "(4) Any claim for a bad debt deduction under this section shall be supported by that evidence required by the Department."

The Department insisted that Ally and Santander provide Forms RD-108 (Application for Title & Registration) ("RD-108 Forms") for each motor vehicle included in their Claims. An RD-108 Form is a combined tax collection, vehicle title and registration application, and statement of vehicle sale. *See* Michigan Dealer Manual § 7-1.2 < http://www.michigan.gov/sos/0,4670,7-127-49534_50300-74113--,00.html > (accessed October 21, 2016). The RD-108 Form is prepared by the motor vehicle dealer and submitted by the dealer to the Michigan Department of State. *Id*. at § 7-2. The motor vehicle dealer remits the sales tax due on the vehicle purchase with the RD-108 Form to the Michigan Department of State. *Id.* at § 8-1.2. The Department of State provides a copy of the RD-108 Form to the Department of Treasury at the time that it remits the sales tax paid by the dealer to the Department. *See* MCL 257.815(2). After the Department of State processes the RD-108 Form, it returns a transaction receipt which is a form RD-108L and returns the transaction receipt to the dealer. *See* <http://www.michigan.gov/sos/0,4670,7-127-49534-20902--,00.html> (accessed October 22, 2016). The motor vehicle dealer does not generally provide a copy of the RD-108 Forms or the transaction receipts to Ally and Santander, and therefore Ally and Santander do not have copies of the RD-108 Forms for most of the vehicles included in their claims.

The Department argued that the RD-108 Form is essential to prove that sales tax was paid on the motor vehicle sale. The Department's contention is meritless because Ally and Santander have provided numerous documents for the vehicles establishing that the dealers did, in fact, previously pay sales tax to the Department on these vehicles. Ally and Santander have provided sufficient proof that the tax was paid, but even if the Court is not persuaded by Ally's and Santander's proof, it merely creates an issue of fact for trial such that summary disposition was inappropriate.

Notably, MCL 205.54i does not require an RD-108 Form to be provided for each motor vehicle included in a refund claim. The statute merely provides, "Any claim for a bad debt deduction under this section shall be supported by that evidence required by the department." MCL 205.54i(4). The Department has not promulgated any rules pursuant to the Michigan Administrative Procedures Act, MCL 24.201, *et. seq.* establishing what evidence must be provided to support a bad debt refund claim. Instead, after Ally and Santander submitted their claims, the Department arbitrarily decided that an RD-108 Form must be submitted for each motor vehicle included in the claims. See Dep't Ally Br. at Exhibit 3, ¶ 9; Dep't First Santander Br. at Exhibit 5, ¶ 9; Dep't Second Santander Br. at Exhibit 5, ¶ 9. There was no guidance from the Department with regard to what supporting documentation must be provided before Ally and Santander submitted their claims. Only after the claims were submitted and this litigation was commenced, the Department added a statement to its website requiring RD-108 forms to be submitted for motor vehicle bad debt refund claims.[5] As this Court has explained, "In order for an agency regulation, statement, standard, policy, ruling, or instruction of general applicability to

[5] After these cases were pending at the Court of Appeals, the Department also issued a new Revenue Administrative Bulletin on December 2, 2015, RAB 2015-27, which contains the requirement to provide RD-108 Forms for motor vehicle refund claims.

have the force of law, it must fall under the definition of a properly promulgated rule. If it does not, it is merely explanatory." *Danse Corp v City of Madison Heights*, 466 Mich 175, 181, 644 NW2d 721 (2002) (holding that guidelines contained in a State Tax Commission "Assessor's Manual" did not have the force of law because they were not promulgated under the Michigan Administrative Procedures Act). Policy statements issued by a state agency which are not promulgated under the APA do not have the force of law. *Clonlara, Inc v State Bd of Ed*, 442 Mich 230, 239; 501 NW2d 88 (1993).

Despite the fact that the RD-108 Form is a document prepared by and submitted by the motor vehicle dealer – not Ally or Santander – the Department requested that they provide the RD-108 Forms for each vehicle purchased that was included in the refund claims. The Department has stated that it is permitted to request whatever evidence it deems necessary to substantiate the claim, and therefore if Ally and Santander do not provide the RD-108 Forms to the Department, then the Department can deny their refund claims. The statutory requirement of MCL 205.54i is that sales tax was previously paid to the Department. It does not require that a claimant provide RD-108 Forms.

The Court of Claims, affirmed by the Court of Appeals, held that even though the RD-108 Forms may already be in the Department's records, the Department could require the claimant to provide the forms since MCL 205.54i gives the Department discretion to determine the evidence necessary to support the claim. However, the Department has chosen a document as evidence that a lender typically would not have and may not be able to obtain. In some cases, Ally and Santander can request copies of the RD-108 Forms from its dealers. However, in some cases, the dealer may have gone out of business since the motor vehicle was sold and the dealer's records are no longer available, or the records may have been disposed of by the dealer. The

Michigan Dealer Manual requires motor vehicle dealers to retain the RD-108 forms for five years. *See* Michigan Dealer Manual § 2-1.4 <http://www.michigan.gov/documents/sos/Dealer_Manual_Chapter_2_186041_7.pdf> (accessed October 22, 2016). The account at issue may have been written off more than five years from the date of the sale, or the bad debt refund claim may have been filed more than five years from the date of the sale. In those situations, the dealers may have already disposed of the RD-108 Forms.

The Department has also suggested that Ally and Santander can simply request a copy of the RD-108 Form directly from the Michigan Secretary of State "for a small fee." In fact, the Secretary of State charges $11.00 for each title history request which would include the RD-108 forms. < http://www.michigan.gov/sos/0,4670,7-127-1585-28744--,00.html> (accessed October 22, 2016). While $11.00 may be a "small fee," it adds up to a rather large fee when multiplied by thousands of accounts. To obtain copies of the RD-108 forms from the Secretary of State for Ally's and Santander's accounts would cost them several thousand dollars. For example, there are 1,931 accounts included in the Ally Claim. (Affidavit of Sheryl Flynn at Exhibit A). If Ally were required to obtain title histories from the Secretary of State for each vehicle included in the Ally Claim, it would cost Ally $21,241, which is clearly not a "small fee." Additionally, it is not clear that Ally and Santander would even be able to obtain documentation from the Secretary of State sufficient to satisfy the Department, since they would be third parties requesting title histories for customers. Unless the request falls under one of the "permissible use" reasons, all "personal information" in the title history will be redacted before it is produced. < http://www.michigan.gov/sos/0,4670,7-127-1585-28744--,00.html> (accessed October 22, 2016). Bad debt refund claims are not among the "permissible use" reasons and therefore some of the information would be redacted. It is not clear whether the Department would even be

satisfied with a redacted RD-108 form. It is clear that the RD-108 forms are not documents within Ally's and Santander's possession or that are easily obtainable, as the Department claims and, therefore, the Department's requirement that the forms be provided is unreasonable.

Additionally, the RD-108 is not the only way to show that sales tax was previously paid, and Ally and Santander provided other supporting documentation for all of the vehicles. Regardless, the Department already possesses the RD-108 Forms for all vehicles comprising the Ally and Santander Claims. A certificate of title cannot be issued if the sales tax has not been paid on the vehicle. MCL 257.815(2). As part of this process, the Secretary of State's office is required by statute to provide a copy of the RD-108 Form to the Department of Treasury. MCL 257.815(2). The Department could easily pull the RD-108 Forms from its own records for each of the vehicles included in the claims and verify that sales tax has been paid.

Instead, the Department is erecting artificial barriers to prevent lenders from claiming the sales tax refunds to which they are entitled under MCL 205.54i. In this case, the Department has latched onto the RD-108 Forms despite the fact that Ally and Santander have provided numerous documents establishing that sales tax was paid on each and every vehicle at issue. Ally and Santander have met the requirements under the statute. Ally and Santander, thus, are entitled to their refund. The Department is abusing its authority under MCL 205.54i(4) in a manner that prevents Ally and Santander from meeting the requirements of the statute without incurring additional, significant costs. The Court should not permit the Department to engage in such gamesmanship at the expense of a legitimate refund claim brought by a Michigan taxpayer. If the validated RD-108 Forms are the cornerstone of this case, then the Department can review the copies of those documents that it has in its records and determine for itself that sales tax was paid on these vehicles. Otherwise, it can review the documentation that Ally and Santander provided

during audit, including copies of the retail installment contracts showing the sales tax itemized as a separate item and the vehicle certificate of titles showing that sales tax was paid on the vehicle, to establish the same thing.

MCL 205.54i requires that sales tax have been paid and remitted on the taxable item for which a tax refund is being sought. By the documentation Ally and Santander have provided to the Department for each vehicle at issue in the Ally and Santander Claims, they have proven that sales tax was paid on each and every vehicle. That is all that is required under the statute, and therefore Ally and Santander are entitled to their refund. Accordingly, this Court should reverse the judgment of the Court of Claims and find that Ally and Santander have sufficiently substantiated the refund claims. At the very least, however, the documentation that Ally and Santander provided creates a factual issue as to whether the tax was previously paid on the vehicle purchases at issue, and it was impermissible for the lower court to conclude on summary disposition that tax was not paid. Thus, in either case, the Court should reverse the judgment of the Court of Claims regarding this issue.

III. The Application for Leave to Appeal Should Be Granted Pursuant to MCR 7.305(B)(3) Because the Court of Appeals Erred In Holding That Ally's Election Forms Did Not Satisfy MCL 205.54i.

A. Standard of Review

The Court reviews a trial court's decision on summary disposition *de novo*. *Potter*, 484 Mich at 410. Additionally, contract interpretation presents a question of law which is reviewed *de novo*. *Archambo v Lawyers Title Ins Co*, 466 Mich 402, 408, 646 NW2d 170 (2002).

B. Ally and the Dealers Executed Joint Elections Pursuant To MCL 205.54i(3) Providing That Ally Is Entitled To Receive the Sales Tax Refunds

In order for the lender or the retailer to claim a refund, MCL 205.54i requires that they execute a joint election specifying which of them is entitled to claim the refund.

The statute provides:

> (3) After September 30, 2009, if a taxpayer who reported the tax and a lender execute and maintain a written election designating which party may claim the deduction, a claimant is entitled to a deduction or refund of the tax related to a sale at retail that was previously reported and paid if all of the following conditions are met:
>
> (a) No deduction or refund was previously claimed or allowed on any portion of the account receivable.
>
> (b) The account receivable has been found worthless and written off by the taxpayer that made the sale or the lender on or after September 30, 2009.

MCL 205.54i(3).

Ally provided written elections it executed with the dealers who reported and remitted the sales tax at issue in the claim for accounts totaling $348,918.33 of the Ally Claim. See Flynn Aff., ¶ 8. Ally used two forms for the written elections, which contain similar language. See Muhn Aff., Exhibits. The first form provides:

> Entitlement to Tax Refund or Deduction on Accounts Under MCL 205.54i. The Retailer and the Lender agree that the Lender is the party entitled to claim any potential sales tax refunds or deductions under MCL 205.54i as a result of bad debt losses charged off after September 30, 2009, on any and all Accounts currently existing or created in the future which have been assigned from the Retailer to the Lender. The Retailer agrees that it has not and will not claim a deduction or refund under MCL 205.54i with respect to any Accounts currently existing or created in the future and hereby relinquishes to the Lender all rights to the Accounts and all rights to claim such deductions or refunds.

The second form contained similar, but not identical language:

> Entitlement to Tax Refund or Deduction on Accounts Under MCL 205.54i. The Retailer and the Creditor agree and elect that the Creditor is the party entitled to claim any potential sales tax refunds or deductions under MCL 205.54i as a result of bad debt losses charged off after September 30, 2009, on any and all Accounts currently existing or created in the future which have been funded by the Creditor and assigned to the Creditor by the Retailer. The Retailer agrees that it has not and will not claim a deduction or refund under MCL 205.54i with respect to any Accounts currently existing or created in the future which have been funded by the Creditor and assigned to the Creditor by the Retailer and hereby relinquishes to the Creditor all rights to the Accounts currently existing or created in the future which have been funded by the Creditor and assigned to the Creditor by the Retailer.

Both forms define "Accounts" as:

> "Accounts" means any and all accounts and contracts created between the Retailer and its retail customers with respect to the purchase of tangible personal property which is subject to Michigan sales tax, **which accounts are or have been assigned directly from the Retailer to the Creditor** [Lender].

Id.

The Department has taken the position, affirmed by the lower court and Court of Appeals, that the written elections do not apply to the accounts included in the Ally Claim. The Department takes the phrase "currently existing" found in the language of the written election forms out of context and mischaracterizes that language in an attempt to argue that they do not, in fact, cover the accounts at issue in this case. That is contrary to the plain language of the written elections, and to the extent that there is some ambiguity in the agreements such that the parties' intent might arguably be relevant, concluding that the written elections do not cover the accounts at issue in this case ignores all the objective evidence of the parties' intent regarding these written elections.

First, it is important to note that Ally created its own written election forms in support of its claim because there is no departmental form that Ally and its dealers could have used. Nor has the Department issued any regulations detailing the required content or language of the written elections. Ally took all prudent steps to create a written election that complied with the requirements of MCL 205.54i(3).

C. The Plain Language of the Written Elections Covers the Accounts that Form Ally's Refund Claim in This Case

The language in the election forms that Ally and its retailers executed qualifies under MCL 205.54i as a written election designating which party may claim the sales tax refund. The language in the forms could not be any clearer. The written election forms specifically refer to MCL 205.54i, and clearly state that the parties elect that "Creditor is the party entitled to claim any potential sales tax refunds or deductions under MCL 205.54i as a result of bad debt losses charged off after September 30, 2009, on any and all Accounts currently existing or created in the future . . . ." See exhibits to Muhn Aff.

The plain language of the written elections states that they apply to all accounts "currently existing" (i.e., those that are the subject of this case and that were already in existence and assigned to Ally at the time that the written elections were executed) and to accounts "created in the future" (i.e., to apply prospectively to sales of motor vehicles and the creation of corresponding customer accounts that would occur after the execution of the written elections). See exhibits to Muhn Aff. Moreover, the definition of "Accounts" in the agreement include "any and all accounts . . . created between Retailer and its retail customers . . . which accounts are or have been assigned directly from Retailer to the Creditor." See exhibits to Muhn Aff. That is, it expressly includes accounts, such as those at issue in this case, that already had been assigned to Ally.

The Department's position, upheld by the Court of Claims and Court of Appeals, is that the election forms do not apply to the accounts in the claim because (1) the accounts that comprise the claim were written off between November 1, 2009 and June 30, 2010 and (2) the election forms were executed in 2013 and 2014. The Department seized upon the phrase "currently existing" in the election forms. It reasoned that because the accounts comprising the bad debts were written off as bad debts for income tax purposes prior to the execution of the written election, the accounts were not "currently existing" at the time the written elections were executed. This is an incorrect interpretation of the language of the election.

This interpretation is directly contrary to the definition of "Accounts" in the written elections that specifically includes "accounts [which] are or have been assigned directly from the Retailer to the Creditor." Any account previously assigned from the Retailer to Ally is included in the election form – regardless of when it was assigned and regardless of when the account was written off as a bad debt.

The accounts existed when the retailers originated them, and they continue to exist today in the hands of Ally. The accounts did not cease to exist simply because they were written off as bad debts for tax and accounting purposes. These are mere bookkeeping entries and have no effect on the validity or application of the written election. Even after the accounts were written off, Ally could still enforce the installment agreements against the purchasers and the purchasers still owed the indebted amounts to Ally. Ally continued to have the right to repossess the collateral and to seek deficiency judgments for the remaining balances. Businesses routinely continue to try to collect accounts which have been written off their books for accounting or tax purposes because the write-off does not change anything about the enforceability of the accounts.

The statute itself contemplates that the accounts are still active and collectible even after they have been charged off as bad debts. It states,

> If a consumer or other person pays all or part of a bad debt with respect to which a taxpayer claimed a deduction under this section, the taxpayer is liable for the amount of taxes deducted in connection with that portion of the debt for which payment is received and shall remit these taxes in his or her next payment to the department. Any payments made on a bad debt shall be applied proportionally first to the taxable price of the property and the tax on the property and second to any interest, service, or other charge.

MCL 205.54i(2). The statute anticipates that payments may be made on accounts that have already been written off as bad debt. The statute requires that a taxpayer repay any tax refunds it received for accounts where payments are made by the customer after the tax refund is received. The Department would certainly expect a taxpayer to repay any tax refunds it had received for a bad debt that had already been written off where subsequent payments were made. Yet, the Department believes that the accounts are not "currently existing" after they are written off as bad debts. The Department's positions are at odds with each other and only benefit the Department.

The Court of Claims, as noted by the Court of Appeals, believed that the phrase "currently existing" in the election forms would be rendered meaningless if the forms were to apply to accounts that had already been charged off. But that interpretation makes no sense. As is clear from the plain language of the election form, all that the phrase "currently existing" was intended to do was to make clear that the election forms applied to accounts that had already been assigned from the dealers to Ally, and to accounts that would be assigned by the dealers to Ally in the future. To find that the election forms apply to all accounts – those already written

off and those yet to be written off – would not render the phrase "currently existing" meaningless, but rather give the election form its plain and unambiguous meaning.

The plain language of the written elections unquestionably applies to the accounts that had already been assigned to Ally, and the Court of Appeals' different interpretation of this language was clearly erroneous.

CONCLUSION

The Court of Appeals decision in this case is clearly erroneous because the Department's interpretation of MCL 205.54i as barring any refund where collateral is repossessed is wrong under the plain language of the statute. The Court of Appeals decision is also clearly erroneous because it upholds a requirement imposed by the Department that is not in MCL 205.54i – namely the requirement to provide RD-108 Forms as the only means to prove that sales tax was paid on an account that is the subject of a bad debt tax refund claim. Finally, the Court of Appeals decision is clearly erroneous because the Department's interpretation of the written election forms as not applying to bad debts that were already written off before the forms were executed by Ally and its dealers is plainly wrong. For all of the reasons detailed in this Application for Leave to Appeal, this Court should grant Ally and Santander leave to appeal the Court of Appeals decision in this case, or peremptorily reverse the decision of the Court of Appeals.

RELIEF SOUGHT

The Plaintiffs-Appellants, Ally Financial, Inc. and Santander Consumer USA, Inc. request this Honorable Court grant leave to appeal or, alternatively, peremptorily reverse the Court of Appeals opinion and hold that Ally and Santander are entitled to payment of their refund claims.

Respectfully submitted,
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Dated: November 1, 2016

CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2016, I electronically filed Plaintiffs/Appellants, Ally Financial, Inc. and Santander Consumer USA, Inc.'s Application for Leave to Appeal with the Clerk of the Court using the TrueFiling System which will give notice of such filing to all parties of record, and did also serve same via U.S. mail upon:

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